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Letter dated 25 October 2004 from the Chairman of the Security Council Committee established pursuant to resolution 1373 (2001) concerning counter-terrorism addressed to the President of the Security Council

I write with reference to my predecessor's letter of 7 July 2004 (S/2004/559). The Counter-Terrorism Committee has received the attached fourth report from Bolivia submitted pursuant to paragraph 6 of resolution 1373 (2001) (see annex). I would be grateful if you could arrange for the present letter and its annex to be circulated as a document of the Security Council.

(*Signed*) Andrey I. **Denisov**
Chairman
Security Council Committee established pursuant to resolution
1373 (2001) concerning counter-terrorism

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Annex

Letter dated 20 October 2004 from the Permanent Representative of Bolivia to the United Nations addressed to the Chairman of the Counter-Terrorism Committee

[Original: Spanish]

I have the honour to refer to your note of 30 June 2004, in which you communicated, on behalf of the Counter-Terrorism Committee, additional observations and questions on the report submitted by the Government of the Republic of Bolivia pursuant to paragraph 6 of Security Council resolution 1373 (2001). I am pleased to transmit herewith the necessary information and clarifications for the Committee's information (see enclosure).

(*Signed*) Ernesto **Araníbar Quiroga**
Ambassador
Permanent Representative

Enclosure*

[Original: Spanish]

Replies to the questionnaire from the Counter-Terrorism Committee concerning Security Council resolution 1373 (2001)

Analysis by the Office of the Vice-Minister of Justice

Security Council resolution 1373 (2001) requires States to prevent and suppress terrorist acts, including through increased cooperation and full implementation of the relevant international conventions relating to terrorism which those States have ratified.

Paragraphs 1 to 3 of that resolution set out the responsibilities of States within the framework of the worldwide campaign against terrorism.

This first report contains information concerning measures taken by Bolivia pursuant to resolution 1373 (2001).

1. In accordance with paragraph 1 (a) of the resolution concerning the prevention and suppression of the financing of terrorist acts, and in accordance with Bolivia's current domestic law, the Office of the Attorney-General is responsible for investigating offences and initiating criminal prosecutions in the courts. It is required to carry out all necessary actions to prepare the indictment and participate in the prosecution in accordance with the provisions of article 124 of the Constitution, the international treaties and conventions currently in force, article 70 of the Code of Criminal Procedure and articles 3 and 14 of the Office of the Attorney-General Organization Act.

Article 185 ter of the Penal Code establishes the basic outline of the administrative regime in relation to money-laundering and to that end establishes the Financial Intelligence Unit (FIU). Supreme Decree No. 4771 defines the organization and responsibilities of the Unit; the procedures and means of transmission for the information it receives; and the system of administrative offences and procedures for the imposition of penalties against financial entities or their directors, managers or administrators. Under article 2 of the Decree, "the Financial Intelligence Unit, which is part of the organic structure of the Office of the Banks and Financial Entities Examiner, is a decentralized body with functional, administrative and operational autonomy, **responsible for receiving, requesting, analysing and, where necessary, transmitting to the authorities, after appropriate processing, any information relating to money-laundering**". Paragraph 8 of article 19 (Functions) requires the Unit "to submit duly substantiated information to the competent authorities for criminal investigation and prosecution if the Unit's investigations reveal the existence of a suspicious transaction".

2. Concerning paragraph 1 (b) of resolution 1373 (2001), on the criminalization of "the wilful provision or collection, by any means, directly or indirectly, of funds by their nationals or in their territories with the intention that the funds should be used, or in the knowledge that they are to be used, in order to carry out terrorist acts", it should be noted that, firstly, as put forward in the recommendation

* Annexes are on file with the Secretariat and are available for consultation.

concerning criminalization, it is defined as entirely an offence of activity, that is, the intention is to penalize behaviour which does not in fact damage any legal goods but may hypothetically endanger such goods in future, as with the collection or provision of funds.

The wording of the recommendation, by including the words "by any means" and "directly or indirectly", reflects the existence of an open-ended, general and imprecise definition of the offence; wording of this type makes it possible to penalize a number of forms of behaviour which do not harm or place in real danger legal goods which the law seeks to protect in the fight against terrorism. In this sense, our legal system is governed by the principle of reservation of the law, which establishes that rules of criminal law must be drafted in the most clear and precise manner possible in order to make rational use of the State's penal power and ensure that abuses and injustices are not committed when defining as offences forms of behaviour which are harmful, as is well known, when using a wording proscribed in the field of criminal law.

3. Concerning paragraph 1 (c) of resolution 1373 (2001), it should be understood that under our legal system the freezing of funds and other financial assets is a precautionary measure affecting the assets of the person concerned. In this sense, the intent of a precautionary measure is strictly procedural: its primary objective is to ensure, by preventing the suspect from evading or obstructing the operation of the justice system, that the purpose of the proceedings is met and any sentence imposed is carried out (security in personam), and to ensure that civil harm resulting from the offence is compensated and the cost of the proceedings is covered (security in rem).

As noted above, the freezing of funds and other financial assets constitutes a precautionary measure in rem which serves solely to ensure compensation for civil harm done and to cover the cost of the proceedings. It is appropriate only where there is a minimum of evidence of the guilt of the accused. It should be specified here that by their nature precautionary measures cannot be regarded or utilized as preventive measures; they are not intended to prevent the commission of offences, since intrinsically they can play only a procedural, not a substantive role (substantive criminal law).

Our legal system recognizes precautionary measures in rem, as stated in article 252 of the Code of Criminal Procedure, which refers to the list of measures in rem provided for in the Code of Civil Procedure. The latter lists the following: (1) **preventive annotation, which is** the means of ensuring that the court's decision takes precedence over other claims not recorded or recorded subsequently; (2) **preventive seizure** is an interim measure, pending the appropriate judicial process, to guarantee the outcome of the court proceedings when there is a concern that the respondent or debtor might remove or conceal his assets or the item which is the object of the legal action; (3) **confiscation** is used for the preventive or precautionary safe keeping required by the precautionary measures; (4) **judicial intervention** serves to transfer, to a third party designated by the court, the management of an asset which produces income or revenue which cannot be the object of preventive seizure, confiscation or deposit; (5) **prohibition on entering into transactions or contracts in relation to particular assets** is a measure designed to bar any changes in the status quo prevailing at the time of the application which might result in harm. Here, the greatest similarity is to the freezing of funds.

Article 169 of the Code of Civil Procedure provides for other precautionary measures: "Aside from the cases provided for in the preceding articles, any person having good cause to fear that, during the period prior to the judicial recognition of his claim, the latter may suffer imminent or irreparable harm may request such urgent measures as are most appropriate in the circumstances to ensure provisionally the application of the court's decision."

The above legal framework is sufficient to enable the State to create mechanisms through the Office of the Attorney-General so that precautionary measures in rem can be taken in each particular case. It should be noted that these measures are of a judicial nature, meaning that they may be authorized only by the judge assigned to the case.

Supreme Decree No. 4771, article 39, provides for the administrative suspension of an operation for a maximum period of 48 hours. Any extension of this period requires a court order.

It is recommended that this administrative suspension be increased to 72 hours with a view to enabling the investigative activities of the Office of the Attorney-General to be carried out.

4. Article 133, paragraph 1 (d) ("Terrorism") of the Penal Code states that "Anyone who participates in, acts in the service of or collaborates with an armed organization existing for the purpose of committing crimes against common security, life, physical integrity, freedom of movement or property, with a view to subverting the constitutional order or spreading a state of unrest, alarm or collective panic among the populace or a sector thereof, shall be punished by 15 to 20 years' imprisonment, without prejudice to the penalty to be imposed should such crimes be committed."

5. As for paragraph 2 (a), recruitment for terrorist groups has not been defined as an offence to date. Article 133 of the special part of the Penal Code already establishes the offence of terrorism, and articles 20 et seq. of the general part define criminal participation. Bolivia does not, therefore, see any need to define recruitment for terrorist groups as a separate offence. The Office of the Vice-Minister of Justice is not aware of any draft legislation relating to the use of arms, munitions, explosives and chemical weapons referred to in the report of Bolivia.

6. Concerning paragraph 2 (b), the Ministry of the Interior is responsible for establishing mechanisms for the sharing of information with other States and the provision of early warnings.

7. As for paragraph 2 (c), the National Commission for Refugees (CONARE) is responsible for developing mechanisms to control and investigate requests for refugee status. Supreme Decree No. 24423 of 26 November 1996 also relates to the legal regime for immigration. We consider that Bolivia has the necessary legal instruments for compliance in this regard.

8. In respect of paragraph 2 (d), Bolivia has no legislation to prohibit terrorist groups from using its territory to commit acts of terrorism against other States or their nationals. We would suggest that, rather than enacting legislation, preventive measures must be taken in the area of migration. It is for the Ministry of the Interior to consider or formulate policies in the field of migration control.

9. With regard to paragraph 2 (e), as already explained under item 1, the Office of the Attorney-General is the body responsible for initiating criminal prosecutions in the courts, as laid down in article 70 of the Code of Criminal Procedure. In any case, the Office of the Attorney-General is required to submit statistical reports on prosecutions and convictions in the field of terrorism and the financing of terrorism.

The penalty for the offence of terrorism is from 15 to 20 years' imprisonment; the maximum penalty allowed under Bolivian law is 30 years' imprisonment without possibility of remission. Under Title III, Penalties, article 27 of the Penal Code reads as follows: "Article 27, Custodial Sentences. (1) Rigorous imprisonment. Rigorous imprisonment shall be applied in the case of offences of particular seriousness and shall have a duration of one to 30 years. For sentences running concurrently, the maximum term shall in no case exceed 30 years. (2) Ordinary imprisonment. Ordinary imprisonment shall apply to less serious offences and shall be for a period of one month to eight years."

In this regard, Bolivia has adopted legislative measures to ensure that terrorism is considered a serious offence and that the penalty is appropriately severe. This contradicts the report submitted by Bolivia, which states that no provision has so far been adopted in respect of paragraph 2 (e) of resolution 1373 (2001).

10. Concerning paragraph 2 (f), the Office of the Attorney-General and the Ministry of Foreign Affairs are responsible for establishing cooperative mechanisms in investigations and providing for extensive cooperation through the signature of inter-agency agreements. The Code of Criminal Procedure contains a section on international judicial and administrative cooperation, which is quoted in the report submitted by Bolivia.

11. In relation to paragraph 2 (g), the Ministry of the Interior is responsible, through the National Office of Migration, for border control and the issue of identity and travel documents. The report refers to a number of measures which have been taken in the area of border controls and restrictions on the issue of visas and identity documents.

12. Concerning paragraphs 3 (a) and 3 (b), the Ministry of the Interior and the Office of the Attorney-General are responsible for carrying out the tasks relating to this item. The Code of Criminal Procedure (the Act of 1970) contains a section on international judicial and administrative cooperation, which states that the fullest assistance is to be given in response to requests from foreign authorities. Such requests are to be submitted to the Ministry of Foreign Affairs and Worship, which then informs the Office of the Attorney-General.

13. Concerning paragraphs 3 (c) and 3 (d), Bolivia has, by ratifying the agreements mentioned in the report, shown its willingness to take part in the worldwide fight against terrorism.

14. As for paragraph 3 (d), Bolivia has ratified the International Convention for the Suppression of the Financing of Terrorism (Act No. 2279 of 27 November 2001) and the agreements mentioned in the report. Thus, Bolivia has complied with the relevant part of resolution 1373 (2001).

15. Concerning paragraph 3 (e), the application of international agreements ratified by Bolivia requires that domestic legislation be brought into line with such

agreements, particularly in relation to the Constitution and the applicable rules of criminal law.

16. In respect of paragraph 3 (f), Bolivia has ratified the 1951 Convention relating to the Status of Refugees, and CONARE is responsible for monitoring its implementation.

17. As for paragraph 3 (g), the 1951 Convention prohibits the granting of refugee status to any person who has committed an offence. As with the previous item, CONARE is responsible for monitoring compliance in this regard.

18. Concerning point 3.3, in many cases the provisions of the resolutions and our legal system are not in alignment, and there is therefore a need for harmonization of our domestic law. The deadline of 90 days set out in resolution 1373 (2001) is a very brief period for compliance with all its provisions.

19. Many of the points have been dealt with in the additional reports submitted by Bolivia. That information will clear up many of the issues raised by the Counter-Terrorism Committee.

Assessment of the Financial Investigation Unit

Effectiveness in the protection of the financial system

1.5 The CTC notes from the first report (at page 3) that the FIU provided instructions to national financial entities so that they could meticulously monitor suspect financial operations carried out to and from Bolivia. The CTC would appreciate further information from Bolivia concerning the legislation creating the obligation to report suspicious and unusual transactions. In particular, the Committee would be grateful for further information, as to:

- What criteria are used to decide if transactions are to be considered as suspicious?
- What are the penalties for non-compliance with the requirement to report suspicious financial transactions?

Article 107 of Act No. 2297 of 20 December 2001 and article 30 of Supreme Decree No. 24771 of 31 July 1997 establish the obligation to report suspicious financial transactions to the FIU. In addition, to supplement this article, the FIU issued administrative decision UIF/016/99 of 12 July 1999, which establishes the Instruction Bulletin and Manual of Operational Procedures for Preventing, Detecting and Reporting the Legitimizing of Illicit Profits in the Financial System and Auxiliary Services, article 12 of which provides the obligation to report suspicious transactions.

Article 10 of the Instruction Bulletin and Manual of Operational Procedures for Preventing, Detecting and Reporting the Legitimizing of Illicit Profits in the Financial System and Auxiliary Services, issued by the FIU, stipulates when a transaction should be considered unusual. Article 11 indicates when a transaction should be considered suspicious, stating: "For the Obligated Subject, the operation or transaction with unusual characteristics shall be considered 'suspicious' when the client declines to provide additional information or when the explanations and documents presented by the client are markedly inconsistent or incorrect or do not resolve the doubt held by the Obligated Subject."

In the case of penalties, the supreme executive authority of the FIU holds hearings to determine administrative liability, and the Office of the Banks and Financial Entities Examiner (in cases where Obligated Subjects are within its competence) implements the resulting penalties, subject to the legal regime established under Act No. 1488 of 14 April 1993 (Banks and Financial Entities), chapter II, title VIII, and the Regulations on Administrative Penalties of the Office of the Banks and Financial Entities Examiner.

1.6 The CTC would appreciate receiving an explanation of the applicable laws, regulations and practices in Bolivia for identifying persons or entities:

- Which maintain a bank account;

Article 26 of Supreme Decree No. 24771 of 31 July 1997 requires the Obligated Subject to register and verify by reliable means the identity, activity and domicile of its clients when initiating a commercial relationship. Moreover, chapter II of the Instruction Bulletin for Preventing, Detecting and Reporting the Legitimizing of Illicit Profits in the Financial System, lays down rules governing the obligation of the Obligated Subject to know the client, identify him, identify the financial beneficiary, and keep the client's information and profile up to date.

- On whose behalf a bank account is maintained (i.e. beneficial owners);

The second paragraph of article 26 of Supreme Decree No. 24771 of 31 July 1997 lays down rules governing the obligation of the Obligated Subject to establish the identity of persons on whose behalf an account is being opened or a transaction is being carried out, when it appears that the client is not acting on his own behalf, in particular in the case of legal persons which are not carrying out business, financial, or corporate transactions in the place where they maintain their headquarters or legal domicile. Similarly, chapter II of the Instruction Bulletin for Preventing, Detecting and Reporting the Legitimizing of Illicit Profits in the Financial System lays down rules governing the obligation of the Obligated Subject to know the client, identify him, identify the financial beneficiary, and keep the client's information and profile up to date.

- Who are beneficiaries of transactions conducted by professional intermediaries.

Article 26 of Supreme Decree No. 24471 of 31 July 1997 and chapter II of the Instruction Bulletin for Preventing, Detecting and Reporting the Legitimizing of Illicit Profits in the Financial System.

Does Bolivia impose identification obligations on persons who operate trusts in order to obtain information about the trustees, settlors/grantors and beneficiaries of such a trust? Please outline the procedures in place in Bolivia that enable foreign law enforcement agencies or other counter-terrorist entities to obtain this information in cases where terrorism is suspected.

The Office of the Pensions, Securities and Insurance Examiner and the Office of the Banks and Financial Entities Examiner requires regulated entities that under some circumstances serve as trustees to obtain all information regarding the client/beneficiary. However, this practice is restricted and fully controlled by the Financial Sector.

1.7 The CTC notes from the third report (at pages 3 and 4) that the FIU is preparing draft legislation against money-laundering in order to oblige professionals (notaries, lawyers, etc.), foreign exchange bureaux, alternative money transmission agencies and non-governmental organizations to report suspicious transactions to the FIU, as well as to monitor alternative money transmission agencies and foreign exchange bureaux. The CTC will appreciate receiving a progress report on the enactment of this draft legislation as well as an outline of its proposed provisions. The CTC would be also grateful to be provided with a copy of the final assessment report, submitted by GAFISUD, IMF and the World Bank, referred to in the third report (at page 5).

The draft legislation on money-laundering is in the final stages of revision and is expected to be submitted to Congress in late October 2004. It characterizes the offence of money-laundering as a separate crime, increases the penalty, provides for the seizure and confiscation of assets linked to money-laundering as well as the reinforcement of money-laundering investigative procedures, sets forth the administrative regime of the FIU, and broadens the range of subjects required to report to FIU.

Copies of the assessment reports of GAFISUD, IMF and the World Bank is attached hereto.

1.8 The CTC would appreciate knowing how many suspicious transaction reports (STRs) were received by the Financial Police, and by the Ministry of Finance Sector on the Prevention of Money-Laundering or by other competent authorities. Please also indicate how many STRs were analysed and disseminated, as well as how many of these have led to investigations, prosecutions or convictions.

In Bolivia, the sole entity empowered to conduct financial investigations (assessments) on the legitimizing of illicit profits is the FIU, which does not provide reports to the Financial Police or the Ministry of Finance.

In accordance with the provisions of article 40 of Supreme Decree No. 24771 of 31 July 1997, the FIU submits to the Office of the Attorney-General a substantiated report when there are grounds for inferring that the transaction is linked to the legitimizing of illicit profits.

The FIU has received 481 reports (both mandatory fiscal reports from the Office of the Attorney-General and STRs), all of which were analysed. They resulted in 358 investigations, which were conducted by the FIU. From these, the FIU transmitted 60 cases to the Office of the Attorney-General, and two led to conviction for the legitimizing of illicit profits; the others were delayed because of modifications to the Bolivian judicial system.

1.9 Regarding paragraph 1 (a) of the resolution, the CTC would appreciate learning whether the FIU has been provided with sufficient resources (human, financial and technical) to carry out its mandate. Please provide appropriate data in support of your response.

Currently, the FIU is served by 15 persons, including its Executive Director. It has basically not changed since the start of its operations, its functions remaining those assigned to it by law. The technological resources are now obsolete, and the number of transactions that must be monitored has increased. The country's economic crisis has prevented the FIU from procuring new technology and more

human resources during the past three administrative periods. In other words, immense efforts are being made to fulfil the legal mandate because the resources are insufficient.

1.10 Regarding the effective implementation of paragraph 1 (a) of the resolution, does Bolivia provide training to its administrative, investigative, prosecutorial and judicial authorities to enforce laws related to:

- Typologies and trends on terrorism financing methods and techniques;

It should not be forgotten that the FIU has a legal mandate vis-à-vis the legitimizing of illicit profits, not vis-à-vis terrorism financing, and its activities in this regard (although they have included the financial sector) have focused solely on the authenticity of transactions and the risks to that sector.

- Techniques for tracing property that is the proceeds of crime or is to be used to finance terrorism and ensure that such property is seized, frozen or confiscated?

It should not be forgotten that the FIU has a legal mandate vis-à-vis the legitimizing of illicit profits, not vis-à-vis terrorism financing, and its activities in this regard (although they have included the judicial system) have been due solely to lack of experience and knowledge on the part of law enforcement officials.

Please outline corresponding programmes and/or courses. What mechanisms/ programmes does Bolivia have in place to educate its various economic sectors on how to detect suspicious and unusual transactions related to terrorist activities and to prevent the movement of illicit money?

As mentioned above, the FIU has jurisdiction over the whole financial system, and it has designed and is designing courses for the entities under its supervision. In the case of special or in-depth courses, foreign technical assistance is required because Bolivia lacks sufficient resources to conduct such programmes. It has made efforts to provide assistance to other sectors, but the need to reserve its resources for its own tasks has limited the scope of such assistance.

1.11 In the context of the effective implementation of paragraphs 1 (a) and 1 (d) of the resolution, the CTC would be grateful to receive statistics on the number of cases where sanctions for providing support to terrorists or terrorist organizations were imposed against financial and non-financial institutions.

None.

1.12 Regarding the reference in the third report (at page 3) to the draft legislation against money-laundering, including the legal provisions authorizing the freezing of funds in accordance with the requirements of paragraph 1 (c) of the resolution, the CTC would like to emphasize that, for the purposes of paragraph 1 (c) of the resolution, the legal provisions in place should provide for the freezing of funds, regardless of origin, even if they are:

- Suspected of being linked to terrorism but have not as yet been used to commit a terrorist act;
- Linked to terrorist activities which have not as yet caused any material damage;

The CTC would appreciate receiving an outline of proposed legal provisions, if any, which would enable Bolivia to meet these requirements. In their absence, what steps does Bolivia intend to take fully to meet this requirement of the resolution?

On the recommendation of IMF and at the request of the Bolivian authorities, it was considered useful to separate the draft legislation on money-laundering from legislation on terrorism financing, postponing the latter until 2005. Supreme Decree No. 24771, which regulates the FIU, authorizes the freezing of transactions for 48 hours when they are considered suspicious (regardless of where the money originates). The draft legislation on Money-laundering seeks to increase the period of time during which transactions can be frozen. Subsequent actions are the responsibility of the judiciary.

1.13 Regarding the effective implementation of paragraph 1 (c) of the resolution, would Bolivia please also outline how its Criminal Code (as referred to in the third report at page 3) as well as other legal provisions in place allow appropriate authorities to freeze funds, regardless of origin, when the funds are held in the names of persons and entities identified in lists, other than those approved for the purpose of Security Council resolution 1267 (1999), as being linked to terrorist activities? The CTC would also be grateful for an outline of the procedures used to designate an organization as a terrorist organization. Could Bolivia provide data on the number of terrorist organizations that it has so designated, in particular foreign terrorist organizations other than those listed by the Security Council? Could an organization be designated a terrorist organization based on information from another State? If so, what would be the procedure and how long would it take? In the absence of any relevant provisions, please indicate the steps that Bolivia intends on taking in order to meet the requirements of paragraph 1 (c) of the resolution regarding matters related to the designation of terrorist organizations.

For the answer to the first question, see the reply to 1.12. The remaining questions are not within the competence of the FIU.

1.14 In regard to compliance with paragraph 1 (c), could Bolivia provide the CTC with statistics on the number of cases in which financial assets or economic resources have been frozen, seized or confiscated in relation to the financing of terrorism. The CTC would also appreciate receiving information concerning the number of individuals and/or entities whose properties have been frozen because they featured in a list drawn up by:

- The Security Council;
- Bolivia;
- *Other States or organizations.*

The FIU does not keep the statistics requested.

1.17 In relation to money-laundering and the financing of terrorism, the CTC would be grateful for an outline of any special strategy which Bolivia may have developed to enable its investigative agencies effectively to prevent resources from being transferred to terrorists (e.g. under-invoicing of exports and over-invoicing of imports, manipulation of high-value goods like real estate, gold, diamonds, etc.) What appropriate mechanisms has Bolivia created (e.g. a "task force") to ensure adequate cooperation and information-sharing among the various government agencies that may be involved in investigations of terrorist financing (e.g. police,

customs, FIU and/or other competent authorities)? With regard to the implementation of paragraph 2 (f) of the resolution, could Bolivia please provide the CTC with an outline of its policies, if any, for sharing relevant information with other States concerning suspicious transactions or other matters pertaining to the financing of terrorism.

With regard to policies to combat money-laundering, the FIU has developed a series of relationships with important State actors in the area of intelligence. It has concluded a cooperation and information-sharing agreement with the Office of the Attorney-General and the National Police. In addition, it maintains a direct data exchange with the National Customs Office, the Business Register, the National Tax Service and the financial entities themselves, so as to centralize information in the FIU and transmit it to the competent authorities when the case so warrants.

Analysis by the Ministry of the Interior

The replies provided by the Ministry of the Interior are expanded and clarified in the fourth report, also attached hereto.

While that report gives clarifications with respect to Security Council resolution 1455 (2003), it also clarifies uncertainties with respect to Security Council resolution 1373 (2001) and offers a broader explanation of current Bolivian legislation.